93-503

No. 93-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WILLIAM M. LIPS,
Petitioner,

v.

COMMANDANT, UNITED STATES
DISCIPLINARY BARRACKS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an Article III judge—who grants a petition for a writ of habeas corpus on finding that a serviceman's constitutional rights were violated at his court-martial—erred in considering the writ because a military court "fully and fairly" considered the constitutional issues and found no error.

A. Whether an Article III judge—who grants a serviceman's petition for habeas corpus on finding that the prosecutor's extensive references to the serviceman's post-arrest silence during *cross-examination* and *closing argument* constituted plain error—erred in granting the writ because a military court "fully and fairly considered" the constitutional issue and found no error.

B. Whether an Article III judge—who considers a serviceman's petition for habeas corpus alleging he was denied due process of law at his trial because specific intent evidence, that is, evidence of motive, intent, plan, and design, was improperly admitted to prove general intent crimes—erred in considering the writ because a military court "fully and fairly considered" the constitutional issue and concluded that specific intent evidence was admissible to prove general intent crimes.

LIST OF PARTIES

Plaintiff-Petitioner is William M. Lips. Defendant-Respondent is the Commandant, United States Disciplinary Barracks.

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PETITION FOR A WRIT OF CERTIORARI

William M. Lips petitions for a writ of certiorari to review an opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered on July 1, 1993. The United States Court of Appeals for the Tenth Circuit reversed the opinion and judgment of the United States District Court for the District of Kansas which (1) granted William M. Lips' petition for a writ of habeas corpus and (2) ordered that William M. Lips be retried within 120 days.

OPINIONS BELOW

On *September 1, 1984*, at Hahn Air Force Base, Germany, William M. Lips was convicted by a general court-martial of rape in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. Sec. 920 (1988); forcible sodomy in violation of Article 125, Uniform Code of Military Justice, 10 U.S.C. Sec. 925 (1988); and aggravated assault (three counts) in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. Sec. 920 (1988). He was sentenced to a dishonorable discharge, 20 years' confinement, total forfeiture of pay and allowances, and reduction to the rank of airman basic. On direct appeal, the United States Air Force Court of Military Review affirmed Lips' conviction and sentence on *May 2, 1986*. *United States v. Lips*, 22 M.J. 679 (AFCMR 1986). The decision appears in the Appendix at 21a. The United States Court of Military Appeals denied discretionary review on *March 2, 1987*. *United States v. Lips*, 24 M.J. 45 (CMA 1987). The denial appears in the Appendix at 20a. On *April 17, 1987*, the United States Court of Military Appeals also denied William M. Lips' petition for reconsideration. *United States v. Lips*, 24 M.J. 203 (1987). The denial appears in the Appendix at 19a. On August 13, 1987, the Judge Advocate General of the Air Force denied William M. Lips' motion for a new trial.

On *October 27, 1988*, while confined in the United States Disciplinary Barracks at Leavenworth, Kansas,

William M. Lips filed a petition for a writ of habeas corpus under 28 U.S.C. Sec. 2241 (1988) in the United States District Court for the District of Kansas naming the Commandant of the Disciplinary Barracks as the defendant. In his petition for habeas corpus, William M. Lips alleged (1) that the military judge improperly admitted certain sexually explicit materials at trial; and (2) that the prosecutor violated his right against self-incrimination by referring to his post-arrest silence during *cross-examination* and in *closing argument*.

On *July 31, 1992* the United States District Court for the District of Kansas granted William M. Lips' petition for habeas corpus holding that the prosecutor's repeated comments on William M. Lips' post-arrest silence resulted in a violation of his constitutional rights under the Fifth Amendment of the Constitution. *Lips v. Commandant, United States Disciplinary Barracks*, —— F. Supp. —— (D.C.K. #88-3396, July 31, 1992). The decision appears in the Appendix at 9a.

On *July 1, 1993*, the Circuit Court of Appeals for the Tenth Circuit reversed holding that the District Court erred in granting habeas corpus relief on the grounds that the petitioner's constitutional rights were violated by improper prosecutorial cross-examination and closing argument. *Lips v. Commandant, United States Disciplinary Barracks*, —— F.2d —— (10th Cir. #92-3359, July 1, 1993). The decision appears in the Appendix at 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on July 1, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) (1988).

STATUTES INVOLVED

Article 120(a.), U.C.M.J., 10 U.S.C. Sec. 920(a) (1988) Rape and Carnal Knowledge

(a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife,

by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

Article 125, U.C.M.J., 10 U.S.C. Sec. 925 (1988)
Sodomy

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

Article 128, U.C.M.J., 10 U.S.C. Sec. 928 (1988)
Assault

(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who—

(1) commits an assault with a dangerous weapon or other means of force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

STATEMENT OF THE CASE

A. Facts

In June 1984, William M. Lips was a Senior Master Sergeant (E-8) serving on active duty in the United States Air Force and was assigned to the 50th Civil Engineering Squadron at Hahn Air Base, Federal Republic of Germany. He had been stationed at Hahn Air Base for over eight years and he and his wife lived off post.

On June 2, 1984, William M. Lips talked with Cynthia Carite at the Foodland grocery store on post where she was employed. In conversation he invited her to his home for dinner on June 4, 1984. He also mentioned to Cynthia Carite that his wife was out of the country at a child care seminar in Texas. William M. Lips and Cynthia Carite had known each other for some time and she and her husband had been to Lips' home and had socialized with him and his wife previously.

At 5:30 on the evening of June 4, 1984, Cynthia Carite arrived at William M. Lips' home. Upon entering the house, she removed her coat, took off her shoes, and stood in front of the fireplace. William M. Lips testified that he offered her a drink and that they watched part of a Clint Eastwood movie he was preparing to tape. He also showed her a .357 magnum pistol he had borrowed from a friend which is like the one used in the movie. In the kitchen Cynthia Carite picked up a copy of *Penthouse Variations* and began to page through it. She read aloud from one of the articles. She giggled and they began to talk about "kinky sex." (R. 897).

While dinner was cooking they returned to the living room. Cynthia Carite complained about her low-paying job. Lips commented jokingly, "I know where you can get a part-time job that pays a hundred dollars an hour . . . I'll take the first twenty minutes." Cynthia Carite laughed and said, "I've been told I'm sitting on a gold mine." (R. 899-900). Cynthia Carite then stood up, undressed herself, and walked over to William M. Lips. William M. Lips testified that it was Cynthia Carite who initiated this activity and the sexual relations that followed. They discussed "kinky sex" further and participated in some bondage sex.

They dressed and then returned to preparing dinner. While the steaks were cooking in the fireplace she fixed herself another drink and teased him about tying lousy knots. After dinner, they watched a film for twenty or thirty minutes and then went upstairs where they engaged in further sexual activity. When they finished, Cynthia

Carite asked William M. Lips if he had enjoyed himself and if he knew of anyone who was "a senior NCO . . . mature . . . not young, [who] had money, [and] who would be willing to pay for this?" The clear inference is that she was willing to prostitute herself. William M. Lips said he would inquire.

Before leaving at about 9:30, Cynthia Carite kissed William M. Lips and said, "How about something for the gold mine . . . to keep it open?" William M. Lips gave her $60 in cash. She responded that she thought she was worth $200, or his wife would find out. William M. Lips said he would meet her outside the Base Exchange at 10:00 the next morning with the rest of the money. Cynthia Carite threatened to ruin his career if he didn't and she warned him not to cross her. The next day at 10:00 he looked for her at the Base Exchange and later at Foodland, but he could not find her. He returned to work and was informed that Air Force Office of Special Investigation (OSI) agents were looking for him.

Cynthia Carite's story is considerably different. According to Cynthia Carite, soon after she arrived, William M. Lips, threatened her with a knife, pointed a gun at her, and forced her to perform "kinky sex." After dinner she and William M. Lips went upstairs and engaged in further sexual conduct. She was in fear of her life. The next day she discussed the evening with the man she was living with and later reported William M. Lips to the authorities. William M. Lips was arrested the same day, read his rights, and on the advice of defense counsel, made no statement to the authorities.

B. General Court-Martial

On *September 1, 1984*, Senior Master Sergeant William M. Lips was tried by general court-martial at Hahn Air Force Base, Germany, on charges of rape in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. Sec. 920 (1988); forcible sodomy in violation of Article 125, UCMJ, 10 U.S.C. Sec. 925 (1988); and aggravated assault (three-counts) in viola-

tion of Article 128, UCMJ, 10 U.S.C. Sec. 928 (1988). He was convicted of the offenses and sentenced to a dishonorable discharge, 20 year's confinement, total forfeiture of pay and allowances, and reduction to the rank of airman basic.

At trial the defense counsel called Senior Master Sergeant William M. Lips as a witness to testify. At the beginning of his examination, the defense counsel asked Sergeant Lips the following two questions:

> Q. Senior Master Sergeant Lips, is this the first statement that you have made, the first statement publicly to government officials?
>
> A. Yes, Sir.
>
> Q. Why is that?
>
> A. The day I was apprehended, or late that evening, about eleven o'clock, I talked with Captain Hallett-Weller, the [Assigned Defense Counsel], on the telephone. She advised me not to make any statements to anyone under any circumstances about what had occurred in my apartment on the 4th of June. . . .[1]

In response to additional questions asked by defense counsel, William M. Lips testified that Cynthia Carite came to his home while his wife was away, had sexual relations with him, had dinner with him, had sexual intercourse with him after dinner, and then asked him for money in return for not telling his wife about what occurred.

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[1] (R. 838). These two questions asked by the defense counsel are improper and should have been objected to by the prosecutor. In the absence of an objection from the prosecutor, the military judge should have admonished counsel. Mil. R. Evid. 512(a)(1) of the Manual for Courts-Martial specifically prohibits either trial or defense counsel from referring to the defendant's post-arrest silence. Mil. R. Evid. 512(a)(1), MCM, 1984 at III-31. *See also Morgan v. Hall*, 569 F.2d 1161, 1168 (1st Cir.), *cert. denied*, 407 U.S. 910 (1978) (although defense counsel first raised the matter of defendant's post-arrest silence, the prosecution improperly used the silence to undermine the accused's testimony).

On cross-examination the prosecutor asked Sergeant Lips the following questions:

Q. Is there any part of it that I've mentioned to you that you have not had for weeks before you c[a]me in here for first time and t[old] your story about this?

A. This is not the first time I've told my story about this, sir.

Q. We've been through that, Sergeant Lips. I asked you a simple question. This is, in fact, the first time you've told your story to anyone who is not required to keep from disclosing it?

. . . .

Q. Before you came in this courtroom and told your story to anybody that had anything to do with the prosecution of this case, any official concerned with it for that matter who was not required to keep what you told them quiet, before that happened, you had every bit of material I've talked about here and you [had] it for weeks, did you not?

A. Yes, sir.

Q. And you have measured your account of this against that material and waited until this time to tell it, correct?

A. I have not measured my account against that material, no, sir.

Q. You have waited until this time—

A. I have examined all that material, yes, sir.

Q. —and you have waited until this time to provide this account, correct?

A. I didn't have any other opportunity to provide this account, sir.

Q. I didn't ask you that, Sergeant Lips. We went through that again. Do you want to do it again? You don't think the OSI would have talked to you? You don't think I would have talked to you? You don't think Captain Basten would

have talked to you? You don't think the security police would have talked to you?

A. Objection, Your Honor.

. . . .

Q. You know that what's going on here is that you have chosen not to talk about this for the reasons that you told us because it was the advice of counsel and because you thought it was in your best interests. But you also know that if you wanted to talk about it, you could have each and every day. You could have talked to me [the prosecutor]. You could have talked to Captain Basten [the assistant prosecutor]. You could have talked to the OSI [criminal investigators]. You could have talked to your commander. You could have talked to any number of people.

(R. 1235-38). The trial judge did not halt this line of questioning or give limiting instructions to the jury.

In closing argument the prosecutor stated that no evidence of guilt could be inferred from the fact that Sergeant Lips waited until the trial to tell his story, but then the prosecutor proceeded to comment extensively on Lips' post-arrest silence, how the victim had told her story to the police immediately, but how the accused had said nothing until the trial, and how Lips had time to fabricate a story after hearing the evidence.

He's getting the fruits of everything she says. He can mull over and sort through what she's had to say about this, and he can turn and twist the story in-between. More important than mulling over or sorting through what she's had to say about this, he can mull over and sort through the other evidence, things that have been found in his house, things that have been found out about him. And he can try to weave the lie between those things. He has the opportunity to do that for weeks and weeks, and weeks, undistracted. Then he comes in this courtroom and he sits down here and testifies. And in terms of trying to find out whether or not he's lying, there's not

> six other stories that he's told on six other occasions to measure it against. . . .

(R. 1700).

> But what happened is, this guy sat here and he told a story on Saturday. Nobody's ever heard it before. Nobody's ever had a chance to study, think, and figure out how to take him apart. And nobody knows what his answers to the on and on and on questions will be. So I stand up here and jerk him around, trying him out. And you all see the product. Now, again, contrast that with the situation that the girl was in. Her story's been told from the 5th of June, on.

(R. 1708). The defense counsel did not object to the prosecutor's improper references to Sergeant Lips' post-arrest silence; nor did the military judge instruct the jurors that such references to Sergeant Lips' post-arrest silence were improper and that no inference of guilt should be drawn from them.

At Sergeant Lips' trial, the prosecutor also introduced into evidence a 65-minute pornographic video tape and four sadomasochistic magazines which were shown to the jurors. Sergeant Lips objected to the introduction of the magazines and the video tape on the grounds that the items were admitted in violation of Military Rules of Evidence 403 and 404(b).[2] After reviewing the magazines and video tape, the military judge admitted the items in evidence and showed the 65-minute pornographic video tape in its entirety to the jury and showed the magazines to the jurors.

C. United States Air Force Court of Military Review

Senior Master Sergeant William M. Lips appealed his court-martial conviction to the United States Air Force Court of Military Review. In his brief, Senior Master Sergeant William M. Lips argued that the prosecutor's

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[2] *United States v. Biswell*, 700 F.2d 1310, 1316 (10th Cir. 1983) (probable value of prior acts substantially outweighed by danger of unfair prejudice under Rule 403).

improper comments on Lips' post-arrest silence during cross-examination and closing argument was unconstitutional under *Doyle v. Ohio*, 426 U.S. 610 (1976).[3]

The three military officers serving on the United States Air Force Court of Military Review rejected Lips constitutional challenge to the prosecutor's comments in three sentences. *United States v. Lips*, 22 M.J. 679, 883 (1986). *See* App. at 28a. In addressing the *Doyle* issue, the Air Force Court of Military Review never discussed Lips' contention that the prosecutor impermissibly commented on Lips' post-arrest silence during cross-examination.

In the Air Force Court of Military Review, Senior Master Sergeant Lips also challenged the admissibility of

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[3] In his brief to the Air Force Court of Military Review Senior Master Sergeant Lips argued as follows:

> Appellant's trial included approximately two weeks of evidence taking and witnesses. During trial counsel's *cross-examination* of appellant, appellant was questioned extensively as to when he first talked to anyone concerning the alleged incident and in particular, why he chose not to talk to anyone other than his counsel prior to trial, (in fact, trial counsel's phraseology consistently utilized the attorney-client privilege to indicate that the appellant's version of the incident was somehow improperly withheld until trial.) (R. 1235-42) The *apparent purposes of this line of questioning were twofold on the part of trial counsel. First*, he was seeking to establish a negative inference which he later vigorously argued to the members, from the fact that appellant had remained silent prior to trial. *Secondly*, trial counsel was on a fishing expedition for any matter protected by the attorney-client privilege that he could get the appellant to divulge on cross-examination.

Appellant's Brief submitted to the Air Force Court of Military Review (emphasis added). In addition, William M. Lips argued in his brief to the Air Force Court of Military Review that:

> "[*t*]*hrough* cross-examination, and again several times during his argument on findings, *trial counsel relied on a theory that commenting upon a failure of appellant to speak up prior to his trial is appropriate to impeach appellant*, a theory unsupported by law. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)."

Id. (emphasis added).

the pornographic 65-minute video tape and the sexually explicit magazines under Military Rules of Evidence 403 and 404(b).[4] The Court concluded that the evidence was properly admitted to establish Lips' "motive, intent, plan and design," and that the "trial judge was within the broad discretion given him to admit the challenged evidence."[5] The Air Force Court also concluded the "photographs and the video tape depicted scenarios for non-consensual sex."[6]

D. United States Court of Military Appeals

The United States Court of Military Appeals denied discretionary review on *March 2, 1987*. App. at 20a. On *April 17, 1987*, the United States Court of Military Appeals also denied William M. Lips' petition for reconsideration. App. at 19a. And on August 13, 1987, the Judge Advocate General of the Air Force denied William M. Lips' motion for a new trial.

E. United States District Court

On *October 27, 1988*, while confined in the United States Disciplinary Barracks at Leavenworth, Kansas, William M. Lips filed a petition for a writ of habeas corpus under 28 U.S.C. Sec. 2241 (1988) in the United States District Court for the District of Kansas naming the Commandant of the Disciplinary Barracks as the defendant. In his petition for habeas corpus, William M. Lips alleged (1) that the military judge improperly ad-

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[4] Military Rules of Evidence 403 and 404(b) are identical to Federal Rules of Evidence 403 and 404(b).

[5] *United States v. Lips*, 22 M.J. 679, 682-83 (AFCMR 1986). App. at 25a and 27a.

[6] *Id.* at 682. App. at 26a. The trial judge admitted the evidence at trial even though he recognized that the type of activity revealed in the video tape "would always purport to demonstrate *consensual conduct, not forcible conduct* on an unwilling victim." (R. 212). The Air Force Court of Military Review thus inaccurately and incorrectly states that the "photographs and the video tape depicted scenarios for *non-consensual sex*." *Id.*

mitted certain sexually explicit materials at trial; and (2) that the prosecutor violated his right against self-incrimination by referring to his post-arrest silence during *cross-examination* and in *closing argument*.

On *July 31, 1992* the United States District Court for the District of Kansas granted William M. Lips' petition for habeas corpus holding that the prosecutor's repeated comments on William M. Lips' post-arrest silence resulted in a violation of his constitutional rights under the Fifth Amendment of the Constitution. *Lips v. Commandant, United States Disciplinary Barracks*, —— F. Supp. —— (D.C.K. #88-3396, July 31, 1992). App. at 9a. The District Court denied William M. Lips' second contention that 65-minute pornographic video tape and 4 sexually explicit magazines were improperly admitted into evidence in violation of Military Rules of Evidence 404(b) and 403. The District Court concluded that the "trial judge admitted the evidence to show motive, intent, plan, and design" and that Sergeant Lips "failed to show that the trial judge's ruling resulted in a fundamentally unfair trial." App. at 11a.

In considering William M. Lips' petition for habeas corpus, the District Court acknowledged that "its review of a claim made in a military habeas corpus petition is limited." *Id.* The District Court also applied the four-part test set forth by the Tenth Circuit Court of Appeals in *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990), for reviewing petitions for habeas corpus from military servicemen. *See* App. at 5a and *infra* at 15. In applying the four-part test, the District Court concluded (1) "that the asserted error, impermissible comment on petitioner's post-arrest silence, is of substantial constitutional dimension"; (2) that "the issue before the court is clearly one of law rather than a fact question previously determined by the military tribunal"; (3) that there are "no unique military considerations which apply to this issue"; and (4) that "the issue was raised before the military courts of review," but was summarily dismissed on

the grounds of "waiver for lack of contemporaneous objection." App. at 12a.

Having decided that William M. Lips' "claim meets the requirements for review," the District Court considered the issue of whether prosecutor's repeated comments on Lips' post-arrest silence violated his Fifth Amendment rights under the Constitution. *Id.* The District Court reviewed the transcript and found it "reveals numerous occasions during cross-examination where the prosecutor repeatedly referred to petitioner's failure to 'tell anyone his story until now.' "[7] In addition, the District Court notes the existence of "other exchanges throughout the transcript where direct comment was made [by the prosecutor] concerning petitioner's post-arrest silence." *Id.*

Based on the record, the District Court "concludes that the manifest intent of the prosecutor was to comment on the petitioner's post-arrest silence and, thus, attack his credibility" and that "the natural and necessary impact is that the jury would draw the conclusion that the comments and questions concerned petitioner's right to remain silent." *Id.*

The District Court notes that defense counsel objected at least once in response to the prosecutor's questions. The District Court found, however, that "even if the [Air Force Court of Military Review] did not find [the objection sufficient to preserve the issue], under plain error analysis, the continuous and repeated comment on petitioner's post-arrest silence was 'obvious and substantial error that affected the fairness, integrity or public reputation of the judicial proceedings.' " App. at 17a.

The District Court concludes that the "prosecutor's repeated comments on petitioner's post-arrest silence resulted in a violation of [petitioner's] constitutional rights guaranteed under the Fifth Amendment." App. at 17a-18a. For this reason, the District Court ruled that "peti-

[7] App. at 10a. *See* App. at 13a-14a for examples of the prosecutor's comments on cross-examination.

tioner did not receive a fair trial" and granted petitioner's writ of habeas corpus. *Id.*

F. Court of Appeals for the Tenth Circuit

The United States appealed the District Court's decision to the Tenth Circuit Court of Appeals. On *July 1, 1993*, the Tenth Circuit Court of Appeals reversed holding that the District Court (1) erred in considering petitioner's contention that he was denied a fair trial because sexually explicit evidence was improperly admitted at his court-martial, and (2) erred in granting habeas corpus relief on the grounds that the petitioner's constitutional rights were violated by the prosecutor's improper cross-examination and closing argument.

In its decision the Tenth Circuit Court of Appeals concluded "that although the federal district court had jurisdiction to entertain Lips' petition, its scope of review was . . . limited to determining whether" the military courts gave full and fair consideration to the issues Lips raised in his federal habeas corpus petition. App. at 4a. If the issues "were given full and fair consideration by the military courts," the Court of Appeals notes, "the district court should have denied the petition." *Id.*

After reviewing the record of trial, the Court of Appeals concluded that the military courts did give "full and fair consideration" to the constitutional issues Lips raised in his federal habeas corpus petition. App. at 4a, 6a. Because the constitutional issues raised by Lips were fully and fairly considered by the Air Force Court of Military Review, the Court of Appeals reversed the District Court's decision granting the writ of habeas corpus and remanded the case "to the district court with directions to deny the petition." App. at 4a.

In reversing the District Court's decision, the Tenth Circuit Court of Appeals notes that the scope of review applied by federal courts in reviewing habeas corpus petitions from military personnel is narrower than that applied in reviewing civil cases. App. at 5a. Thus, accord-

ing to the Tenth Circuit Court of Appeals, the "function of the civil courts" in reviewing military habeas corpus petitions is limited to determining whether the claims raised by a military service member have been given full and fair consideration by the military courts. App. at 6a.

Consistent with this view, the Tenth Circuit Court of Appeals outlined in *Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990), a four-part test for federal courts to use in determining if a constitutional issue in a military habeas corpus petition has been fully and fairly considered by a military court.

> [R]eview by a federal district court of a military conviction is appropriate only if the following four conditions are met: (1) the asserted error is of substantial constitutional dimension; (2) the issue is one of law rather than of disputed fact already determined by the military tribunal; (3) there are no military considerations that warrant different treatment of constitutional claims; and (4) the military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards.

App. at 5a-6a. The District Court applied this four-part test and held "the military failed to give adequate consideration to Lips' contention" that his Fifth Amendment rights were violated by the comments made by the prosecutor on Lips' post-arrest silence in cross-examination and during closing argument. App. at 6a. The District Court, however, did not apply the four-part test in denying "Lips' claim regarding the [improper] admission of the sexually explicit materials." *Id.*

The Tenth Circuit Court of Appeals, applying the same standard, reaches a different result and concludes "that the military courts [gave] the matters raised in [Lips'] federal habeas corpus proceeding full and fair consideration and that the district court erred in reviewing these matters *de novo*." App. at (7)a.

The Tenth Circuit states that Lips, in his brief to Air Force Court of Military Review, sets forth as a separate issue the prosecutor's improper comments made during closing argument on Lips' post-arrest silence. However, the Tenth Circuit notes that Lips "did not set forth as a separate issue [in his brief] the prosecutor's cross-examination of Lips and [the Court further notes that Lips] made only passing reference to improper cross-examination in his argument under 'Issue V.' " [8]

With respect to the prosecutor's comments on closing argument, the Tenth Circuit Court of Appeals concludes that "the United States Air Force Court of Military Review gave the issue of improper closing argument 'full and fair consideration,' as required by *Burns v. Wilson* . . ., and also gave 'adequate consideration' to the issue and applied 'proper legal standards,' as required by our *Dodson v. Zelez* . . ." App. at 7a. *See* App. at 28a. For this reason, the Tenth Circuit concludes that "the district court erred in granting habeas corpus relief based on improper prosecutorial closing argument." *Id.*

With respect to the issue of the prosecutor's improper comments on Lips' post-arrest silence during cross-examination, the Tenth Circuit observes that "defense counsel made only one nonspecific objection to this line of questioning" and "did not raise the issue of improper cross-examination on appeal to the United States Air Force Court of Military Review." *Id.* "Because defense counsel did not make a timely and specific objection and also did not assert the issue of improper cross-examination on appeal," the Tenth Circuit concludes that "the matter . . . was not raised in the military courts." *Id.*

Finding nothing in the record indicating an " 'excuse' for either of these procedural defaults," the Tenth Circuit, applying the "cause and prejudice" standard used in reviewing state and federal habeas cases, concludes that the " 'cause and actual prejudice' standard was not met," and held that "the claim of improper cross-examination will

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[8] *See supra* note 3 and accompanying text.

not be reviewed 'on the merits' in the present habeas corpus proceeding." App. at 8a.

In the alternative, the Tenth Circuit Court of Appeals states that the Air Force Court of Military Appeals fully and fairly considered the issue of prosecutor's references to Lips' post-arrest silence in cross-examination, even though the court issued no opinion on the issue, and that the District Court committed error in ruling on the issue.

> Even assuming that counsel's objection at trial to the prosecutor's cross-examination was adequate and further assuming that the matter of improper cross-examination was presented to the United States Air Force Court of Military Review, the fact that the court did not specifically address the question of improper cross-examination in its opinion is not controlling.

App. at 8a n.2. The Tenth Circuit Court of Appeals notes that the absence of a discussion in the Air Force Court of Military Review's opinion concerning the prosecutor's references in cross-examination to Lips' post-arrest silence is not critical because the Air Force Court of Military Review states at the end of its opinion that it has " 'examined the remaining assignments of error and resolved them against the appellant.' " *Id.*

The practice of allowing military courts to decide constiutional issues summarily, the Tenth Circuit Court of Appeals notes, was approved by it in *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986).

> When an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not find the issue meritorious or requiring discussion. 782 F.2d at 145.

App. at 8a n.2. In short, the Tenth Circuit Court of Appeals concludes that because the Fifth Amendment

issue concerning the prosecutor's comments on Lips' post-arrest silence during cross-examination was briefed and argued before the Air Force Court of Military Review, it was fully and fairly considered by the military court even though the issue was summarily disposed of with the statement: "We have examined the remaining assigned errors and resolve them against the appellant." App. at 30a.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Supreme Court of the United States should GRANT [9] the petition for a writ of certiorari in the present case for three reasons: *First*, the decision of the United States Court of Appeals for the Tenth Circuit is in conflict with decisions of the First, Third, Fourth, Fifth, Eighth, Ninth, District of Columbia, and Federal Circuit Courts of Appeal on the issue of the scope of federal court review of military habeas corpus petitions; *Second*, the decision of the Court of Appeals for the Tenth Circuit dramatically restricts the scope of federal court review of constitutional issues raised in military habeas corpus petitions; and *Third*, the decisions of the Court of Appeals for the Tenth Circuit and the Air Force Court of Military Review upholding prosecutorial comment on a defendant's post-arrest silence and the government's use of specific intent evidence, *i.e.*, plan, intent, motive, and design, introduced under Rule 404b and 403, to prove general intent crimes are contrary to decisions of the Supreme Court and Court of Appeals for the Fourth Circuit.

I. CONFLICT IN THE CIRCUITS ON THE SCOPE OF FEDERAL COURT REVIEW OF MILITARY HABEAS CORPUS PETITIONS

The first reason the Supreme Court should grant the petition for a writ of certiorari in the present case is be-

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[9] In the alternative, the Supreme Court may want to HOLD this petition for the Court's decision in *Weiss v. United States*, 36 M.J. 224 (CMA 1992), *cert. granted*, —— U.S. —— (No. 92-1492, May 24, 1993) invoking the Appointments Clause and terms-of-office for military judges and Court of Military Review judges.

cause the decision of the Court of Appeals for the Tenth Circuit is in conflict with decisions of the Courts of Appeals for the First, Third, Fourth, Fifth, Eighth, Ninth, District of Columbia, and Federal Circuits on the issue of the scope of federal review of military habeas corpus petitions.

After World War II and at the end of Korean War the Supreme Court of the United States decided *Burns v. Wilson*, 346 U.S. 137, *rehearing denied*, 346 U.S. 844 (1953). In *Burns*, the Supreme Court broadened the power of the federal courts to review military cases because of the great number of American citizens who were serving or had served in the armed forces.[10]

In affirming the judgment of the Circuit Court of Appeals for the District of Columbia to deny petitions for habeas corpus submitted to the Court from service mem-

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[10] I suppose it cannot be said that the courts of today are more knowledgeable about the requirements of military discipline than the courts in the early days of the Republic. Nevertheless, events quite unrelated to the expertise of the judiciary have required a modification in the traditional theory of the autonomy of military authority.

> These events can be expressed very simply in numerical terms. A few months after Washington's first inauguration, our army numbered a mere 672 of the 840 authorized by Congress. Today, in dramatic contrast, the situation is this: Our armed forces number two and a half million; every resident male is a potential member of the peacetime armed forces; such service may occupy a minimum of four per cent of the adult life of the average American male reaching draft age; reserve obligations extend over ten per cent of such a person's life; and veterans are numbered in excess of twenty-two and a half million. When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.

Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 107-88 (1982). *See* J. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 122-33 (New York: Charterhouse, Inc., 1974).

bers, Chief Justice Vinson in a plurality opinion,[11] states that "it is the limited function of the civil courts to determine whether the military have given fair consideration to each of [the accused's] claims" and "when a military decision has dealt fully and fairly with an allegation raised in [the accused's] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." [12]

The standard that has evolved is that Article III courts can review court-martial judgments on two grounds: the first ground is that a court-martial judgment is void because the court lacked jurisdiction, and the second ground is that the court-martial is defective or procedurally unfair in some fundamental way.[13]

Since *Burns*, the Circuit Courts of Appeal have disagreed over what the proper scope of federal court review of military habeas corpus petitions should be.[14] Some courts have viewed the decision in *Burns v. Wilson*,[15] as expanding "the scope of review slightly, or, at least, to

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[11] Chief Justice Vinson's opinion was joined by Justice Reed, Justice Burton, and Justice Clark. Justice Jackson concurred in the result. Justice Minton concurred in affirming the judgment. Justice Frankfurter thought the case should be reargued. And Justice Douglas' dissenting opinion was joined by Justice Black.

[12] 346 U.S. at 144 and 142.

[13] *Schlesinger v. Councilman*, 420 U.S. 738, 747 (1975).

[14] *Calley v. Callaway*, 519 F.2d 184, 198-99 n.20 (5th Cir. 1975), *cert. denied sub nom., Calley v. Hoffman*, 425 U.S. 911 (1976). *See* Rich, *Federal Court Scope of Review Over Military Habeas Corpus Cases*, 6 MEMPHIS ST. U.L. REV. 83 (1975). *See also* Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 81 COLUM. L. REV. 40, 70 (1981); Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1, 28-54, 74-81 (1971); Burris & Jones, *Civilian Courts and Courts-Martial—the Civilian Attorney's Perspective*, 10 AM. CRIM. L. REV. 139 (1971); J. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 135-36 (New York: Charterhouse, Inc., 1974); Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 OHIO ST. L.J. 193 (1966).

[15] 346 U.S. 137, *rehearing denied*, 346 U.S. 844 (1953).

have shifted the emphasis from mere 'jurisdiction' and 'power,' as the proper subjects for civilian court review, to broader considerations of the 'fullness' and 'fundamental fairness' of the court-martial proceedings." [16] Other courts have developed their own interpretations of the "full and fairness" standard.[17] The standard adopted by

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[16] *De Coster v. Madigan*, 223 F.2d 906, 909 (7th Cir. 1955), *companion case rev'd., Jackson v. Taylor*, 353 U.S. 569, 571 (1957). *See Jackson v. Taylor*, 353 U.S. 569, 572 n.2 (1957).

[17] *See First Circuit*: *Allen v. VanCantfort*, 436 F.2d 625, 629 n.8 (1st Cir.), *cert. denied*, 402 U.S. 1008 (1971) (ineffective assistance of counsel reviewed even though the issue was fully considered by the military appellate courts);

Third Circuit: *White v. Humphrey*, 212 F.2d 503 (3rd Cir.), *cert. denied*, 348 U.S. 900 (1954) (full and fair consideration standard ignored and denial of constitutional due process issue reviewed);

Fourth Circuit: *Kasey v. Goodwyn*, 291 F.2d 174, 178 (4th Cir. 1961), *cert. denied*, 368 U.S. 959 (1962) (denial of constitutional due process issue summarily considered and denied);

Fifth Circuit: *Calley v. Callaway*, 519 F.2d 184, 228 (5th Cir. 1975), *cert. denied sub nom., Calley v. Hoffman*, 425 U.S. 911 (1976) (extensive review of constitutional issues even though most of the constitutional issues were fully and fairly considered by the military appellate courts);

Ninth Circuit: *Daigle v. Warner*, 348 F. Supp. 1074, 1078 (D.C. Hawaii 1972), *rev'd on other grounds*, 490 F.2d 358 (9th Cir. 1973) (full and fair consideration standard "has been subject to different interpretations, [but] the underlying rationale is that review on [military habeas corpus petitions] should be afforded when the petitioner has allegedly been denied a basic constitutional right, the absence of which materially affected his rights to a fair hearing); *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981) (*Burns* plurality does not preclude civil court consideration of the constitutional defects alleged here where it is not clear the issue was fully and fairly considered because no military court articulated an analysis of them);

District of Columbia Circuit: *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (DCC 1969), *cert. denied*, 396 U.S. 1013 (1970) (rejecting government's contention that civilian court review of alleged constitutional errors in court-martial proceeding is precluded where military courts have fully and fairly considered the constitutional issues); *Avrech v. Secretary of the Navy*, 520 F.2d 100 (DCC 1975), *cert. denied*, 425 U.S. 970 (1976) (constitutional issues

the Tenth Circuit Court of Appeals in the present case—that once an issue is briefed and argued before a military court, it is considered to be fully and fairly considered by the military courts and cannot be reviewed by a District Court if the issue is raised in a military habeas corpus petition—is one of the narrowest interpretations of the "full and fair" consideration standard.[18]

In short, different standards of review are being used in the various Circuit Courts of Appeals to review constitutional issues raised in military habeas corpus petitions. Service members, in other words, who raise a constitutional issue in a petition for habeas corpus filed with a District Court, are not having their petitions reviewed uniformly by courts throughout the country. For these reasons, Counsel for Petitioner respectfully requests the Court GRANT the petition for a writ of certiorari in the present case to ensure that all service members who file petitions for writs of habeas corpus in the federal courts receive uniform consideration of the constitutional issues raised in their petitions.

II. ELIMINATION OF FEDERAL COURT REVIEW OF MILITARY COURT DECISIONS IN THE TENTH CIRCUIT

The second reason the Supreme Court should GRANT the petition for a writ of certiorari in the present case is because the decision of the Court of Appeals for the

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raised by service members in military courts are reviewable by federal courts);

Federal Circuit: *Shaw v. United States*, 357 F.2d 949, 953 (Ct. Cl. 1966) (court of claims will review constitutional issues raised by service members even though the issues have been reviewed by military courts).

[18] *Lips v. Commandant, United States Disciplinary Barracks*, —— F.2d —— (10th Cir. #92-3359, July 1, 1993) (Article III judge's finding that prosecutor's continuous and repeated comments on service member's post-arrest silence was an "obvious and substantial error that affected the fairness, integrity, or public reputation of judicial proceedings" reversed where military court fully and fairly considered the issue and denied it summarily without opinion).

Tenth Circuit so restricts federal court review of constitutional issues raised in military habeas corpus petitions that the right of a service member to file a petition for habeas corpus in the Tenth Circuit is rendered meaningless.

The Tenth Circuit Court of Appeals' interprets the standard announced by the Supreme Court in *Burns* to mean that once a constitutional issue is briefed and argued in a military court, there is an unrebuttable presumption that the issue has been fully and fairly considered by the military court irrespective of whether the military court writes an opinion on the issue or disposes of it summarily.

In *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990), the Tenth Circuit Court of Appeals outlined a four-part test for determining when federal court review of a military conviction on habeas corpus is appropriate.[19] Part four of the test states that a military court must give the issue adequate consideration and apply proper legal standards in reviewing it before the issue can be reviewed by a District Court in a military habeas corpus petition. In other words, a District Court in the Tenth Circuit cannot consider a constitutional issue raised in a military habeas corpus petition unless (1) the issue has been briefed and argued before a military court, (2) the military court has given the issue adequate consideration, and (3) the military court has applied proper legal standards in reviewing it.

The analytical problem presented is that if the constitutional issue is briefed and argued before a military court, and is addressed by the military court in either an opinion or is disposed of summarily, the Tenth Circuit considers that the issue has been fully and fairly considered by the military courts and therefore cannot be reviewed by a District Court if the issue is raised in a military habeas corpus petition.

In effect, the Tenth Circuit Court of Appeals has eliminated federal court review of military court decisions in

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[19] *See supra* at 15.

the Tenth Circuit and has denied the writ of habeas corpus to service members who believe their constitutional rights have been violated by the military justice system. If a service member is required to brief and argue a constitutional issue in a military court before the issue can be reviewed by a District Court in a petition for habeas corpus, and if every issue briefed and argued before a military court is deemed by the Tenth Circuit Court of Appeals to be fully and fairly considered by the military court, even if it is dismissed summarily, then no federal district court will ever be able to review a petition from a military court in the Tenth Circuit because every issue will be fully and fairly considered by the military courts and hence not subject to federal court review.

The Tenth Circuit Court of Appeals' application of the *Burns* full and fair consideration standard is so restrictive that it virtually eliminates federal court review of military court decisions in the Tenth Circuit and renders the right of service members to habeas corpus relief in the Tenth Circuit nonexistent.

The importance of denying effective habeas corpus relief to active duty and reserve military personnel is important when one considers that over two million men and women are serving in the armed forces of the United States—all of whom are subject to the Uniform Code of Military Justice and military criminal justice system. This group is larger than the number of citizens subject to criminal codes in the States of Alaska, Wyoming, Vermont, Delaware, North Dakota, South Dakota, Montana, Nevada, New Hampshire, Idaho, Rhode Island, Hawaii, Maine, New Mexico, Utah, Nebraska, and West Virginia.[20]

The policy of denying access of young men and women serving in the armed forces of the United States to

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[20] In World War II, there were over 12,300,000 young men and women who served in the armed forces and were subject to the military justice system. Karlan & Pepper, *The Scope of Military Justice*, 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 285, 286 (1962).

federal courts and of discouraging them from raising legitimate constitutional issues in petitions for habeas corpus is not a policy that his Court should encourage. Not only are these young citizens defending the Constitution and willing to give up their lives for it if necessary, but also they on occasion may need assistance from the federal judiciary and the benefit of civilian review of a constitutional issue.

In the present case petitioner William M. Lips, a career serviceman, was convicted in 1984 by general court-martial and received a 20-year sentence. To date the constitutional violations he raised on appeal have been fully and fairly considered *only* by military officers. A federal district court judge in the Tenth Circuit did rule that Lips' Fifth Amendment rights were violated in his trial, that the constitutional violation amounted to plain error, and that Lips should be retried. But the Tenth Circuit Court of Appeals reversed that decision holding that military officers had fully and fairly considered the constitutional violations raised by Lips in his military habeas corpus petition and that the federal district court judge erred in considering his petition.

To avoid the kind of injustice William M. Lips has had to suffer—no civilian review of his constitutional claims—and to ensure that all military personnel with legitimate constitutional claims will have access to the federal courts if the need arises, the Court should grant the petition for a writ of certiorari in this case and establish rule for federal courts to follow in reviewing habeas corpus petitions filed by service members.

III. THE MILITARY COURT APPLIED THE WRONG LEGAL STANDARDS IN REVIEWING CONSTITUTIONAL ISSUES PRESENTED BY LIPS IN THE APPEAL OF HIS COURT-MARTIAL CONVICTION

The third reason the Supreme Court should grant the petition for a writ of certiorari in the present case is because the Air Force Court of Military Review applied the wrong legal standards in deciding both the post-arrest

silence issue and the evidentiary due process issue raised by Lips in the appeal of his court-martial conviction. On the post-arrest silence issue and the 404b and 403 evidentiary issues, the Tenth Circuit Court of Appeals concludes that Lips' constitutional cliams were fully and fairly considered by military authorities and properly denied.

A. Post-Arrest Silence Issue

The Air Force Court of Military Review devotes three sentences in its opinion to the *Doyle* issue raised by William M. Lips in the appeal of his court-martial conviction:

> [Lips] also contends he is entitled to a new trial because of improper findings and sentencing arguments by government counsel. [Lips'] counsel entered no objection at trial to the new challenged statements made during argument. In view of this, we consider this issue to be waived on appeal in the absence of plain error, which we find no basis here to invoke.

See supra 10 and at 21a. The military court concludes that the *Doyle* issue was waived because no objection was made during argument.

In *United States v. Arnold,* 425 F.2d 204 (10th Cir. 1970), however, the defense counsel did not present a *Doyle* issue objection on closing argument until the case was before the Tenth Circuit Court of Appeals. In addressing the issue and reversing the defendant's conviction, the Tenth Circuit states:

> We are in complete agreement that the record reflects more than ample evidence to support conviction and that the trial court correctly determined that no claim of error presented to support the motion for a new trial had merit. However, appellate counsel presents an additional assignment of error, made for the first time in this court, that is so clearly meritorious in view of our decision in *United States v. Nolan*, 10 Cir., 418 F.2d 588, that we are compelled to reverse the judgment regardless of the lateness of presentation. . . . The error climaxes, as in *Nolan,*

> with a prejudicial closing argument by the government attorney.

Id. at 205. Despite its decision in *Arnold,* the Tenth Circuit Court of Appeals concludes the military court applied the correct legal standard in holding that Lips waived his objection to the prosecutor's prejudicial closing argument. "We think," the Tenth Circuit states, "the United States Air Force Court of Military Review gave the issue of improper argument 'full and fair consideration, as required by *Burns v. Wilson,* . . . and also gave 'adequate consideration' to the issue and applied 'proper legal standards.' " App. at 7a.

In its *Lips* opinion, the Tenth Circuit also states that:

> In cross-examination, the prosecutor attempted to show that the real reason Lips made no post-arrest statements was that he desired to hear Cynthia Carite's testimony in court before giving anyone his version of events so that he could "tailor" his testimony and make it believable. Further, in closing argument to the military jury, the prosecutor stated that while Lips' post-arrest silence was no evidence of guilt, Lips had nonetheless waited until trial "to tell his story," so that he could first hear Cynthia Carite's testimony.

App. at 4a. In these two sentences, the Tenth Circuit Court of Appeals correctly summarizes the intent of the prosecutor in commenting on Lips' post-arrest silence.

In *Doyle v. United States,* 426 U.S. 610 (1976) the Supreme Court of the United States held that this line of questioning and argument used by the prosecutor is improper.

> The State pleads necessity as justification for the prosecutor's action in these cases. It argues that the discrepancy between an exculpatory story at trial and silence at the time of arrest gives rise to an inference that the story was fabricated somewhere along the way, perhaps to fit within the seams of the State's case as it was developed at pretrial hearings. . . .

> Despite the importance of cross-examination, we have concluded that the *Miranda* decision compels rejection of the State's position.

Id. at 616-17. Despite the clearness of the holding in *Doyle*, the Court of Appeals for the Tenth Circuit finds no violation of Lips' Fifth Amendment rights to a fair trial.

By concluding that the military court applied the correct legal standard in deciding the post-arrest silence issues presented by Lips, and by approving the military court's decision on the issues, the Tenth Circuit erred.

B. Specific Intent Evidence Used to Prove General Intent Offenses

With respect to the evidentiary issue and the introduction of sexually explicit materials at Lips' court-martial, the Air Force Court of Military Review states that the pornographic video tape and four sexually explicit magazines were introduced "to establish motive, intent, plan and design" on the part of Lips. App. at 25a. On this due process issue the District Court and the Tenth Circuit Court of Appeals agree that the military court applied the correct legal standard. All three courts agree, in other words, that specific intent evidence, that is, evidence of motive, intent, plan, and design admitted under Rule 404b, can be introduced by the government to prove a general intent offense.[21]

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[21] *See* App. at 25a. Intent, motive, etc. are not issues in Lips' case because the offenses with which Lips is charged—rape, sodomy, assault and battery—are general intent offenses, not specific intent offenses. It is not clear why the government had to introduce the sexually explicit evidence to establish intent, motive, etc. when Lips is charged with general intent offenses. *See United States v. Soundingsides*, 820 F.2d 1232 (10th Cir.), *pet. for rehearing denied*, 825 F.2d 1468 (1987) (per curiam) (evidence of other crimes, wrongs or acts is inadmissible in a general intent case); *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948), *cert. denied*, 338 U.S. 834 (1949), (evidence admitted to prove intent, motive, etc. held inadmissible in general intent rape case where the only issue is whether the sexual contact was consensual or nonconsensual).

However, this finding is contrary to the decision of the Fourth Circuit Court of Appeals in *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948), *cert. denied*, 338 U.S. 834 (1948). In *Lovely*, the Fourth Circuit held that the introduction of specific intent evidence was error in a general intent case where the outcome of the case turns on the credibility of the witnesses as it does in *Lips'* case. In *Lovely*, the defendant was charged with rape and the trial court permitted the introduction of evidence of a prior rape under similar circumstances to prove motive, intent, plan, etc., on the part of the defendant.

In holding that the trial court erred in admitting testimony about the "other rape," the Fourth Circuit Court of Appeals stated that "[t]here was no issue of identity in the case, nor of knowledge, motive or intent, and the crime was not the sort, like a stock swindling scheme or murder for insurance, where the commission of other crimes may tend to establish a plan from which the crime charged can be said to have resulted." *Id.* at 388. Indeed, the Court notes that the defendant admitted he was with the victim in his car and that he had sexual relations with her; thus, "the only question [in the case as in Lips' case is] whether he had had carnal knowledge of her forcibly and against her will." *Id.*

> The fact, if it was a fact, that he had ravished another woman some weeks before, threw no light whatever on that question. It showed merely that he was a bad man, likely to commit that *sort* of crime; and this is precisely what the prosecution is not allowed to show in a criminal case.[22]

Like the trial court in *Lovely*, the military judge in Lips' trial permitted the prosecutor to introduce specific intent evidence to prove the same kind of general intent offense tried in *Lovely*.

However, unlike the Fourth Circuit Court of Appeals, the Air Force Court of Military Review approved the prosecutor's introduction of specific intent evidence to

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[22] *Id. See United States v. Hickson*, 22 M.J. 146, 150 (CMA 1986) (rape is a general intent offense).

prove the general intent offenses Lips was charged with committing. The Tenth Circuit's holding that the military court applied the correct legal standard in reviewing Lips' evidentiary due process issue thus is contrary to the holding of the Fourth Circuit in *Lovely*.

In sum, the Air Force Court of Military Review applied the wrong legal standards in reviewing the post-arrest silence issue and in reviewing the introduction of specific intent evidence under Rule 404b, and the Tenth Circuit is wrong in its conclusion that the Air Force Court "fully and fairly" considered Lips' constitutional claims. Because the Tenth Circuit Court of Appeals held that Lips is not entitled to civilian review on these issues, Lips has never received a full and fair review of the constitutional issues he raised on appeal from the court-martial conviction he received in 1984.

CONCLUSION

Counsel for Petitioner respectfully requests that the Supreme Court of the United States grant the petition for a writ of certiorari in the present case (1) because the decision of the Court of Appeals for the Tenth Circuit is in conflict with decisions of numerous other Circuit Courts of Appeals on the issue of the scope of federal court review of military habeas corpus petitions; (2) because the decision of the Tenth Circuit Court of Appeals virtually eliminates federal court review of military habeas corpus petitions in the Tenth Circuit; and (3) because the military court applied the wrong legal standards in reviewing Lips' constitutional claims and in doing so denied him a fair trial.

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